

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Brady Security & Realty Corporation :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Year 1976. :
_____ :

AFFIDAVIT OF MAILING

State of New York
County of Albany

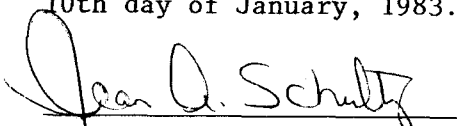
Kathy Pfaffenbach, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of January, 1983, he served the within notice of Decision by certified mail upon Brady Security & Realty Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brady Security & Realty Corporation
522 Fifth Ave., 13th Fl.
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

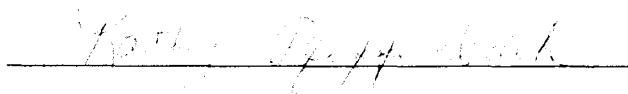
That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
10th day of January, 1983.



Jean Q. Schultz

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



Kathy Pfaffenbach

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

January 10, 1983

Brady Security & Realty Corporation
522 Fifth Ave., 13th Fl.
New York, NY 10036

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
George J. Noumair
Whitman & Ransom
522 Fifth Ave.
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

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In the Matter of the Petition :
of :
Brady Security & Realty Corporation :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Year 1976. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of January, 1983, he served the within notice of Decision by certified mail upon George J. Noumair the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George J. Noumair
Whitman & Ransom
522 Fifth Ave.
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
10th day of January, 1983.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
BRADY SECURITY & REALTY CORPORATION
for Redetermination of a Deficiency or for
Refund of Franchise Tax on Business Corporations:
under Article 9-A of the Tax Law for the Year
1976.

DECISION

Petitioner, Brady Security & Realty Corporation, 522 Fifth Avenue, New York, New York 10036, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the year 1976 (File No. 28529).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 20, 1981 at 9:30 A.M. Petitioner appeared by Whitman & Ransom, Esqs. (George J. Noumair, Esq. and Gerald D. Groden, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether the gain from the sale of petitioner's real property located in New Jersey is includable in petitioner's New York business income for 1976.

II. Whether the gain from such sale is includable in the denominator of the receipts factor of petitioner's business allocation percentage.

III. Whether the New Jersey property should be included in the property factor of the business allocation percentage at fair market value or at cost.

IV. Whether interest income received by petitioner on loans to stockholders should be excluded from petitioner's New York income or alternatively, should be included only in the denominator of the receipts factor of the business allocation percentage.

FINDINGS OF FACT

1. On October 12, 1979, the Audit Division issued to petitioner, Brady Security & Realty Corporation, a Notice of Deficiency asserting additional franchise taxes due under Article 9-A of the Tax Law for the year 1976 in the amount of \$8,622.00, plus interest thereon.

2. Petitioner is a Delaware corporation, the business of which is trifold: petitioner owns approximately 4,500 contiguous acres in New Jersey, a portion of which it leases as residential properties and the remainder of which it actively farms; petitioner manages a marketable securities portfolio; and, petitioner manages royalty interests in oil and gas properties situated in Texas.

3. The farming and leasing operation has its own office on the farm, from which the farm manager supervises such operation and the employees. Double entry sets of books of account for rentals and the farming are maintained in the New Jersey office by a bookkeeper/accountant. The operation retains a New Jersey lawyer and has New Jersey bank accounts.

4. From its rented office in New York City, petitioner manages its securities portfolio, its indirect investments made through securities partnerships and its royalty interests. Petitioner receives its earned dividends and interest at that office.

5. Petitioner's New Jersey employees do not perform any duties in connection with the investment and royalty activities. Its New York employees do not perform any duties in connection with the real estate operation, except for those accounting procedures directed toward the netting and consolidation of figures for the corporation.

6. During 1976, the owners of a farm adjoining that of petitioner expressed interest in purchasing approximately 500 acres from petitioner. The sale was consummated in that year, at a price of approximately \$1,500,000 and a gain to petitioner of \$571,417. On its 1976 franchise tax report, petitioner treated the gain as investment income; petitioner's position in this proceeding is that such gain is not taxable in New York. The Audit Division considered the gain as business income subject to the business allocation formula.

7. In the early 1970's, independent appraisers conducted an appraisal of petitioner's farm, pursuant to a contract with the Internal Revenue Service. After such appraisal, and conferences between petitioner and the Service, a valuation of approximately \$12,000,000 was given to the land. Another appraisal was conducted in 1974; the market value of the farm, as of March 28, 1972, was established, in the opinion of the appraisers, at \$14,800,000. (Both appraisals were thus prior to the sale, referred to in Finding of Fact "6".)

8. In calculating its business allocation percentage for 1976, petitioner utilized the cost of its New Jersey real property (\$1,049,879) in computing the property factor. Petitioner's books and records also reflected said real property at "book value". However, petitioner currently maintains that for purposes of computing the business allocation percentage, the property should be included therein at its fair market value.

9. Petitioner had interest income, returned as "miscellaneous income" of \$56,000 on its 1976 report, principally earned upon loans to shareholders most of whom resided outside New York. The loans were made from petitioner's New Jersey office and repayments were made to that office.

10. All of the proposed findings of fact submitted by petitioner have been adopted by the Commission, with the exception of Paragraphs 3, 5 and 9, which findings state that the diverse operations of petitioner are completely distinct and separate from each other, and are conclusory in nature.

CONCLUSIONS OF LAW

A. That subdivision (9) of section 208 of the Tax Law defines entire net income as "total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department...". To arrive at the percentage of business income to be allocated to New York, the statutory formula provides that property, business receipts and payroll are to be taken into account. Section 210.3(a).

B. That by its requests (a) to exclude the gain from the sale of its New Jersey property from its business income, and (b) to include the receipt from the sale in the denominator of the receipts factor of the business allocation formula, petitioner has called upon the State Tax Commission to exercise the discretionary power conferred by subdivision (8) of section 210 to resort to a method other than the statutory three-factor formula to effect a fair and proper allocation of petitioner's income reasonably attributable to this state.

Where petitioner has consistently included the receipts and expenses attributable to its New Jersey operation in computing entire net income and has consistently included the property, receipts and wages pertaining thereto in the business allocation formula, there is no inequity in requiring inclusion in the tax base of the gain on the sale of a portion of the New Jersey property. Matter of General Foods Corporation, State Tax Commission, June 18, 1973.

Further, petitioner neglected to request the permission of this Commission to alter its business allocation formula, a prerequisite specifically set forth in 20 NYCRR 4-6.1(c). It may not, therefore, retroactively seek separate accounting as to its New York and New Jersey operations. Cf. Matter of Carter-Wallace, Inc., State Tax Commission, June 5, 1981.

Petitioner may, however, adjust its business allocation percentage to include the gain from the sale in the denominator of the receipts factor. Matter of General Foods Corporation, supra; Matter of American-West African Line, Inc., State Tax Commission, January 10, 1967.

C. That petitioner reported its assets on Schedule E, Computation and Allocation of Capital, and on Schedule G, Business Allocation, at book value, consistent with Schedule L, Balance Sheets, of its 1976 federal corporation income tax return. It may not therefore return only one of its assets, the New Jersey property, at fair market value. 20 NYCRR 4-3.1(b); Matter of Aerojet-General Corporation, State Tax Commission, July 7, 1980.

D. That petitioner has demonstrated no special reason for the exercise of the Commission's discretion to exclude interest paid on loans from petitioner's income.

The evidence does not disclose whether the loans were evidenced by notes or were on open account. However, since they were made from, managed by and payable at the New Jersey farm office, they were not business receipts allocable to New York. Cf. 20 NYCRR 4-4.2 et seq.; People ex rel. Burke v. Wells, 184 N.Y. 275, affd. 208 U.S. 14; People ex rel. Edison Electric Light Co. v. Campbell, 138 N.Y. 543; People ex rel. Williams Co. v. Sohmer, 151 A.D. 764 (3d Dept.).

E. That the petition of Brady Security & Realty Corporation is granted to the extent indicated in Conclusion of Law "B"; that the Notice of Deficiency issued October 12, 1979 is to be modified accordingly; and that except as so modified, the deficiency is in all other respects sustained.

DATED: Albany, New York

JAN 10 1983

STATE TAX COMMISSION

Robert W. Bueckel
ACTING PRESIDENT

Frank R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER